

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

JUAN PICOUTO,

08-CV-807-ST

Plaintiff,

ORDER

v.

WESTERN STAR TRUCK PLANT
PORTLAND LLC, a Delaware
corporation qualified to do
business in Oregon,

Defendant.

DANIEL J. SNYDER
CARL LEE POST
ERIN C. McCOOL
1000 S.W. Broadway
Suite 2400
Portland, OR 97205
(503) 241-3617

Attorneys for Plaintiff

DAVID J. RIEWALD
MITCHELL J. COGEN
Bullard Smith Jernstedt Wilson
1000 S.W. Broadway
Suite 1900
Portland, OR 97205
(503) 248-1134

Attorneys for Defendant

BROWN, Judge.

Magistrate Judge Janice M. Stewart issued Findings and Recommendation (#118) on May 27, 2010, in which she recommends the Court grant in part and deny in part Defendant's Motion (#41) for Summary Judgment. Defendant filed timely Objections to the Findings and Recommendation. The matter is now before this Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

I. Portions of the Findings and Recommendation to which Defendant does not object.

Defendant does not object to the portions of the Finding and Recommendation in which the Magistrate Judge recommends the Court (1) grant Defendant's Motion for Summary Judgment as to Plaintiff's Fifth through Eighth Claims (2) grant Defendant's Motion for Summary Judgment as to Plaintiff's First and Second Claims to the extent they allege discrimination or retaliation based on discrete adverse employment actions, (3) grant Defendant's Motion for Summary Judgment as to Plaintiff's Third and Fourth claims except to the extent they allege Defendant

failed to engage in the interactive process or otherwise to accommodate Plaintiff's actual or perceived disability with respect to the May 2008 recall, and (4) deny Defendant's Motion for Summary Judgment as to Plaintiff's First and Second Claims to the extent they allege a hostile work environment. The Court, therefore, is relieved of its obligation to review the record *de novo* as to these portions of the Findings and Recommendation. *Shiny Rock Min. Corp v. U.S.*, 825 F.2d 216, 218. (9th Cir. 1987). *See also Lorin Corp. v. Goto & Co.*, 700 F.2d 1202, 1206 (8th Cir. 1983). Having reviewed the legal principles *de novo*, the Court does not find any error in these portions of the Findings and Recommendation.

II. Portions of the Findings and Recommendation to which Defendant objects.

Defendant objects to the portion of the Findings and Recommendation in which the Magistrate Judge recommends the Court deny Defendant's Motion for Summary Judgment as to Plaintiff's Third and Fourth Claims insofar as they allege Defendant failed to engage in the interactive process or otherwise to accommodate Plaintiff's actual or perceived disability with respect to the May 2008 recall. The Magistrate Judge recommends in the Conclusion of the Findings and Recommendation that the Court should deny Plaintiff's Third and Fourth Claims as to Defendant's alleged failure to accommodate Plaintiff's perceived disability. Defendant contends and Plaintiff does not appear to contest that

an employer does not have a duty to accommodate a perceived disability. In addition, this portion of the Magistrate Judge's recommendation is not analyzed in the substance of the Findings and Recommendation. Based on the record as a whole, the Court concludes the provision for failure to accommodate Defendant's perceived disability likely was included in the Conclusion of the Findings and Recommendation in error and, therefore, the Court does not adopt that portion of the Findings and Recommendation.

With respect to the remainder of Defendant's Objections, the Court notes when any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). See also *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003)(*en banc*).

In its Objections, Defendant reiterates the arguments contained in its Motion for Summary Judgment, its Reply in Support of Summary Judgment, and its statements at oral argument. This Court has carefully considered Defendant's Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

The Court **ADOPTS as modified** Magistrate Judge Stewart's Findings and Recommendation (#118) and, therefore, **GRANTS in part** and **DENIES in part** Defendant's Motion (#41) for Summary Judgment as follows:

1. The Court **GRANTS** Defendant's Motion for Summary Judgment as to Plaintiff's First and Second Claims to the extent they allege discrimination or retaliation based on discrete adverse employment actions.
2. The Court **GRANTS** Defendant's Motion for Summary Judgment as to Plaintiff's Third and Fourth Claims except as to Defendant's alleged failure to engage in the interactive process or otherwise to accommodate Plaintiff's actual disability with respect to the May 2008 recall.
3. The Court **GRANTS** Defendant's Motion for Summary Judgment as to Plaintiff's Fifth through Eighth Claims.
4. The Court **DENIES** Defendant's Motion for Summary Judgment as to Plaintiff's First and Second Claims to the extent that they allege a hostile work environment.
5. The Court **DENIES** Defendant's Motion for Summary Judgment as to Plaintiff's Third and Fourth Claims to the extent that they allege Defendant's failure to engage in the interactive process or otherwise to

accommodate Plaintiff's actual disability with respect
to the May 2008 recall.

IT IS SO ORDERED.

DATED this 13th day of September, 2010.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge